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IN THE

Supreme Court of the United States

October Term, 1972

No.....

MRS. JACOB SIEGLER, individually and as Administratrix of the Estate of Carol J. House, deceased,
Respondent,

v.

AARON L. KUHLMAN and "JANE DOE" KUHLMAN, husband and wife;

and

PACIFIC INTERMOUNTAIN EXPRESS CO., a corporation,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Washington, entered in the above entitled case on November 15, 1972, and the order denying rehearing entered on January 14, 1973.

I.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Washington, attached hereto as Appendix "A," is reported in *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972).

The opinion of the Court of Appeals of the State of Washington, attached hereto as Appendix "B," is reported in *Siegler v. Kuhlman*, 3 Wn.App. 231, 473 P.2d 445 (1970).

II.

JURISDICTION

1. The judgment of the Supreme Court of Washington was entered on November 15, 1972.

2. An order denying rehearing was entered on January 4, 1973 at 10:51 a.m.

3. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), with respect to title, rights, privileges and immunities set up and claimed under the Constitution of the United States.

III.

CONSTITUTIONAL PROVISION CONFERRING JURISDICTION

Constitution of the United States, Amendment XIV, Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

QUESTIONS PRESENTED

1. Is a defendant in a civil action denied procedural due process of law when the State Supreme Court reverses the jury trial decision finding defendant free of fault, imposes

liability upon defendant under a theory of law neither tried nor argued at any level of the state appellate process, and remands the cause for assessment of damages against defendant?

2. Where a civil cause is tried to a jury on a negligence theory, the jury finds for the defendant and the verdict is upheld by the court of appeals against assignment of error only to the instructions on negligence, is defendant denied procedural due process when the State Supreme Court finds the defendant strictly liable for damages under the facts and remands for trial without opportunity for defendant to present evidence of its freedom from liability and the liability of other parties?

3. Is defendant denied procedural due process of law when a State Appellate Court violates its own rule against review of a cause on a theory different from that on which it was tried or appealed, where the State Supreme Court imposes liability upon defendant under a theory not tried and under a question of law not raised on appeal?

4. Where plaintiff is damaged through the fault of a party not joined in suit, and trial is held only on the issue of defendant's fault and resolved by a jury to defendant's favor, is defendant deprived of property without due process of law when, five years following the accident, the State Supreme Court imposes strict liability upon defendant and thus denies opportunity to defendant to prove fault of the responsible party?

V.

STATEMENT OF THE CASE

A. Nature of Action

Petitioners, defendants below, seek certiorari to review a final decision of the Supreme Court of the State of Washington, reversing the Court of Appeals of the State of Washington and the jury verdict of the Superior Court for Thurston County, Washington, in favor of defendants, and directing that the cause be remanded for trial on the sole issue of damages to be awarded against defendants.

B. Pleadings and Proceedings

This is an action for wrongful death. Plaintiff commenced action against defendants on February 19, 1968. Issue was joined and the cause was tried to a jury from October 7 through 10, 1968, in the Superior Court for Thurston County, Washington. The jury rendered a verdict in favor of defendants. Judgment in favor of defendants was entered on October 21, 1968.

Plaintiff appealed to the Washington Court of Appeals, which affirmed the judgment on August 17, 1970. *Siegler v. Kuhlman*, 3 Wn.App. 231, 473 P.2d 445 (1970), (App. "B"). The Washington State Supreme Court granted plaintiff's petition for review and reversed both lower courts on November 15, 1972, and remanded for trial on the sole issue of damages to be awarded in favor of plaintiff and against defendants. Thereupon, on December, 5, 1972, defendants petitioned the Washington Supreme Court for rehearing (App. "C"). Said petition was denied by order entered January 4, 1973, at 10:51 a.m. (App. "D"). This petition for writ of certiorari followed.

C. Stage Where Federal Question Raised

In its petition for rehearing to the Supreme Court of Washington, defendants raised the question that the procedure followed by the Washington Supreme Court and the effect of its decision would deprive defendants of property without due process of law in violation of the Constitution of the United States. The Washington Supreme Court denied defendant's petition for rehearing without opinion.

D. Statement of Facts

On November 22, 1967, the plaintiff's deceased died when her automobile came upon a gasoline tank-trailer which had overturned on the highway. The gasoline tank truck and trailer were owned by defendant Pacific Intermountain Express (P.I.E.) and driven by defendant Aaron L. Kuhlman. The truck was manufactured by Peterbilt, a division of Pacific Car and Foundry Co.; the tank and trailer were built by Fruehauf, and the fifth wheel unit (which had separated from the overturned trailer) was produced by the Silver Eagle Company. Neither Peterbilt, Pacific Car and Foundry Company, Fruehauf, nor Silver Eagle Company were named parties to the lawsuit.

In her complaint, plaintiff sued P.I.E. and its driver and claimed that the death of decedent was caused by their negligence. A jury returned a verdict in favor of defendants.

The trial court had outlined for the jury the plaintiff's claim that defendants' negligence caused the death of decedent. The court gave instructions defining negligence and contributory negligence.

Plaintiff requested two instructions explaining the doctrine of *res ipsa loquitor*. Both were refused. On appeal, plaintiff claimed reversible error in the failure to give said instructions. The Court of Appeals affirmed the verdict and judgment for defendants. 3 Wn. App. 231, 473 P.2d 445 (1970).

Plaintiff was granted review of the decision of the Court of Appeals in the Washington State Supreme Court. That Court ruled that, in view of the facts of the case, defendants were strictly liable to plaintiff and enunciated for the first time a rule of strict liability against those transporting gasoline as freight by truck along the public highway (App. "A"). However, the Supreme Court did not reverse for a new trial, but reversed for the sole issue of damages to be assessed against defendants.

In their petition for rehearing (App. "C"), defendants argued that they were denied due process of law by the Washington State Supreme Court's action in (1) denying a hearing on defendants' liability; (2) deviating from its own established procedural rule by reviewing a case upon a theory different from that on which the case was tried or appealed; (3) reconsidering the facts presented to the jury; (4) foreclosing an opportunity for defendants to join and prove evidence against manufacturing parties as defendants; and (5) retroactively applying a new rule of law.

The Court denied defendants' petition for rehearing by order dated January 4, 1973.

VI.

ARGUMENT

1. The Supreme Court of Washington Denied Defendants the Right to a Hearing on the Question of Their Liability in Violation of Due Process of Law

The Washington Supreme Court reviewed the case below in a theory different from that on which it was tried in the trial court, and made its ruling upon questions not raised in that court nor to either of the appellate courts. It adopted a new theory of law, ruled defendants liable thereunder, and remanded for trial on the limited issue of damages.

The Washington Court, in effect and without acknowledging the fact, violated the rule of a consistent line of procedure decisions in reviewing the case on a theory not presented to it.

> This Court will not review a case on a theory different from that on which it was tried in the trial court, and a question not raised in that court will not be considered on appeal. *National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wn.2d 24, 309 P.2d 742 (1957); *State v. McDonald*, 74 Wn.2d 474, 445 P.2d 345 (1968).

By ruling on an issue not heard below, the Court has retroactively foreclosed opportunity to defendants to determine liability of parties against whom they would have a right of contribution under the Court's new ruling.

> Where a state court overrules a consistent line of procedural decisions with a retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend his substantive rights." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), *Bouie v. Columbia*, 378 U.S. 347, 354 (1964).

The plaintiff's cause of action arose more than five years prior to the court's decision. In the interval, physical evidence has been lost or destroyed, and the defendants would now have an impossible burden to prove which of the parties not joined in the action was at fault.

At trial the only allegation against defendants was their negligence for the death of plaintiff's daughter. Defendants were found not liable for negligence by the jury. The Supreme Court reversed, ruling that a transporter of gasoline would be strictly liable in damages arising from its transport. The defendants had a right to rely upon the status state law that their freedom from negligence would abolish them from liability. Had the law initially disclosed them strictly liable, they would have defended an entirely different case.

> A Federal right was upon the status of state law as of a given moment in the past — or, more exactly, the appearance to the individual of the status of state law as of that moment. *Bouie v. Columbia*, 378 U.S. 347, 354 (1964).

In the instant case defendants have not been accorded the right to a trial of their case. They have had no opportunity to raise defenses to their liability or be heard on that issue. Defendants prevailed at trial against the only issues brought against them. The State Supreme Court reversed and found them liable under a new theory of liability without opportunity to be heard on the application of that theory to the facts of the case, in violation of due process.

> The Federal guarantee of due process extends no state action through its judicial, as well as through its legislative, executive or administrative branch of government . . . our present concern is solely whether the plaintiff has been accorded due process in the primary sense — whether it has had an opportunity to present

its case and be heard in its support. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680-1 (1930).

The defendants have had no opportunity to present their case nor be heard on the findings of fact and conclusions of law of the Washington Supreme Court.

2. The State Court Acted Arbitrarily in Judging the Case Upon a New Theory, in Denial of Due Process

By judging the case upon issues not presented to it, the State Supreme Court arbitrarily deprived defendants of property rights without a hearing.

> The Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property. *In re Converse*, 137 U.S. 632 (1891).

It has been a long-standing rule of the Washington appellate courts that a theory which is not advanced at trial will not be considered on appeal. [*see National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wn.2d 24, 309 P.2d 742 (1957); *State v. McDonald*, 74 Wn.2d 474, 445 P.2d 345 (1968), *supra.*] This same rule has been affirmed *subsequent* to the decision of the instant case. *Nerbun v. State*, 8 Wn. App. 370, ... P.2d ..... (Feb. 1973) The action of the court in this case was an arbitrary exercise of power.

The State Supreme Court did not deny that defendants were free of fault and that third parties not named as defendants may have been liable for plaintiff's damage.

> "Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of *concealed or latent mechanical or metallurgical defects in the carrier's equipment*, from the *negligence of third parties*, from *latest defects in the highways and streets*, and from all of the other haz-

> ards not generally disclosed or guarded against by reasonable care, prudence and foresight. (Court's opinion, App. 'A,' p. 13) (Emphasis added)

However, the defendants were not given notice nor opportunity to join third parties or have a hearing on the potential liability of third parties. The defendants answered for the only allegations raised against them — their negligence. If the cause were tried under a strict liability doctrine, the defendants would have had notice and opportunity to protect against assessment of damages by tender of the defense to third parties; e.g., the manufacturers. The status of defendants as parties free of negligence is a status now lost in any subsequent claim against other parties because defendants had no notice nor requirement to tender the defense or join third parties in the original action. See *Farmers Warehouse Co. v. Fry*, 181 Wash. 365, 43 P.2d 23 (1935).

The Court has rendered a decision which will impose upon defendants a liability to pay damages where it has not been given opportunity to a hearing in its defense in violation of the Fourteenth Amendment.

VII.

CONCLUSION

The Court has deprived defendants of the right to a hearing on the question of their liability in violation of due process of law. The decision of the Washington Supreme Court should be reversed and judgment entered in accordance with the decision of the Washington Court of Appeals.

DATED at Tacoma, Washington, this 13th day of March, 1973.

Respectfully submitted,

DAVIES, PEARSON, ANDERSON,
GADBOW & HAYES, P.S.
By: VINCENT L. GADBOW
Attorneys for Petitioners

APPENDIX A

[FILE
In Clerk's Office
Supreme Court
State of Washington
Date November 15, 1972
/s/ ORRIS R. HAMILTON
Chief Justice]

[No. 41696. *En Banc.* November, 15, 1972.]

MRS. JACOB SIEGLER, *Individually and as Administratix, Petitioner,* v. AARON L. KUHLMAN *et al., Respondents.*

[1] Torts—Strict Liability—Concept of Strict Liability. The purpose of imposing strict liability on abnormally dangerous activities is to place the burden of rectifying a wrong upon the one of two innocent parties whose acts instigated or made the harm possible, and to eliminate problems of proof which might otherwise arise in accidents which destroy all evidence of what actually happened or caused the harmful event to occur.

[2] Torts—Strict Liability—Abnormally Dangerous Activity — What Constitutes — Transporting Gasoline. Transporting gasoline in great quantities as freight along the public highways and streets is an abnormally dangerous activity for purposes of the rule of strict liability.

Rosellini, J. Hamilton, C.J., Finley, J., and Ryan, J. Pro Tem., concur by separate opinion; Neill and Stafford, JJ., dissent by separate opinion; Wright and Utter, JJ., did not participate in the disposition of this case.

Review of a decision of the Court of Appeals, August 17, 1970, 3 Wn. App. 231. *Reversed.*

The Court of Appeals affirmed a judgment of the Superior Court for Thurston County, No. 39911, Charles T.

Wright, J., entered October 21, 1968. Appellant (plaintiff) petitioned the Supreme Court for review.

Action for wrongful death. Plaintiff appealed to the Court of Appeals from a judgment entered on a verdict in favor of the defendants.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MRS. JACOB SIEGLER, individually and as Administrator of the Estate of CAROL J. HOUSE, deceased,
Petitioner,

v.

AARON L. KUHLMAN and JANE DOE KUHLMAN, his wife, and PACIFIC INTERMOUNTAIN EXPRESS CO., a corporation,
Respondents.

No. 41696
EN BANC
Filed Nov. 15, 1972

Seventeen-year-old Carol J. House died in the flames of a gasoline explosion when her car encountered a pool of thousands of gallons of spilled gasoline. She was driving home from her after-school job in the early evening of November 22, 1967, along Capitol Lake Drive in Olympia; it was dark but dry; her car's headlamps were burning. There was a slight impact with some object, a muffled explosion, and then searing flames from gasoline pouring out of an overturned trailer tank engulfed her car. The result of the explosion is clear, but the real causes of what happened will remain something of an eternal mystery.

Aaron L. Kuhlman had been a truck driver for nearly 11 years after he completed the tenth grade in high school and after he had worked at other jobs for a few years. He

had been driving for Pacific Intermountain Express for about 4 months, usually the night shift out of the Texaco bulk plant in Tumwater. That evening of November 22nd, he was scheduled to drive a gasoline truck and trailer unit, fully loaded with gasoline, from Tumwater to Port Angeles. Before leaving the Texaco plant, he inspected the trailer, checking the lights, hitch, air hoses and tires. Finding nothing wrong, he then set out, driving the fully loaded truck tank and trailer tank, stopping briefly at the Trail's End Cafe for a cup of coffee. It was just a few minutes after 6 p.m., and dark, but the roads were dry when he started the drive to deliver his cargo—3,800 gallons of gasoline in the truck tank and 4,800 gallons of gasoline in the trailer tank. With all vehicle and trailer running lights on, he drove the truck and trailer onto Interstate Highway 5, proceeded north on that freeway at about 50 miles per hour, he said, and took the offramp about 1 mile later to enter Highway 101 at the Capitol Lake interchange. Running downgrade on the offramp, he felt a jerk, looked into his left-hand mirror and then his right-hand mirror to see that the trailer lights were not in place. The trailer was still moving but leaning over hard, he observed, onto its right side. The trailer then came loose. Realizing that the tank trailer had disengaged from his tank truck, he stopped the truck without skidding its tires. He got out and ran back to see that the tank trailer had crashed through a chain-link highway fence and had come to rest upside down on Capitol Lake Drive below. He heard a sound, he said, "like somebody kicking an empty fifty-gallon drum and that is when the fire started." The fire spread, he thought, about 100 feet down the road.

The trailer was owned by defendant Pacific Intermoun-

tain Express. It had traveled about 329,000 miles prior to November 22, 1967, and had been driven by Mr. Kuhlman without incident down the particular underpass above Capitol Lake Drive about 50 times. When the trailer landed upside down on Capitol Lake Drive, its lights were out, and it was unilluminated when Carol House's car in one way or another ignited the spilled gasoline.

Carol House was burned to death in the flames. There was no evidence of impact on the vehicle she had driven, Kuhlman said, except that the left front headlight was broken.

Why the tank trailer disengaged and catapulted off the freeway down through a chain-link fence to land upside down on Capitol Lake Drive below remains a mystery. What caused it to separate from the truck towing it, despite many theories offered in explanation, is still an enigma. Various theories as to the facts and cause were advanced in the trial. Plaintiff sought to prove both negligence on the part of the driver and owner of the vehicle and to bring the proven circumstances within the *res ipsa loquitur* doctrine. Defendants sought to obviate all inferences of negligence and the circumstances leading to the application of *res ipsa loquitur* by showing due care in inspection, maintenance and operation. Plaintiff argued negligence per se and requested a directed verdict on liability. On appeal, plaintiff relied in part on RCW 46.44.070 and RCW 46.61.655,[1] relating to the drawbar connecting

1. RCW 46.44.070 reads in part as follows:

"The drawbar or other *connection* between vehicles in combination *shall be of sufficient strength* to hold the weight of the towed vehicle on any grade where operated. *No trailer shall whip,* weave or

trailer to truck, and provisions prohibiting a load from dropping, shifting, leaking or escaping from the vehicle.

The jury apparently found that defendants had met and overcome the charges of negligence. Defendants presented proof that both the truck, manufactured by Peterbilt, a division of Pacific Car and Foundry Company, and the tank and trailer, built by Fruehauf Company, had been constructed by experienced companies, and that the fifth wheel, connecting the two units and built by Silver Eagle Company, was the type of connecting unit used by 95 percent of the truck-trailer units. Defendants presented evidence that a most careful inspection would not have revealed the defects or fatigue in the metal connections between truck and trailer; that the trailer would not collapse unless both main springs failed; there was evidence that, when fully loaded, the tank could not touch the wheels of the tank trailer without breaking the springs because the maximum flexion of the springs was less than 1 inch. Defendants presented evidence that the drawbar was secure and firmly attached; that tanks were built of aluminum to prevent sparks; and that, when fully loaded with 4,800 gallons of cargo, there would be 2 or 3 inches of space between the cargo and top of the tank; that two safety cables connected the two units; that the truck and trailer were regularly serviced and repaired, and records of this preserved and put in evidence; that the unit had

---

oscillate or *fail to follow substantially in the course* of the towing vehicle." (Italics ours.)

RCW 46.61.655 reads in part as follows:

"*No vehicle shall be driven or moved on any public highway unless* such vehicle is so *constructed or loaded as to prevent any of its load* from dropping, shifting, leaking or otherwise *escaping therefrom*, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in the cleaning or maintaining of such roadway by public authority having jurisdiction." (Italics ours.)

been subject to Interstate Commerce Commission spot checks and conformed to ICC standards; and that, at the time of the accident, the unit had traveled less than one-third of the average service life of that kind of unit. There was evidence obtained at the site of the fire that both of the mainsprings above the tank trailer's front wheels had broken as a result of stress, not fatigue—from a kind of stress that could not be predicted by inspection—and finally that there was no negligence on the driver's part.

Defendants also presented some evidence of contributory negligence on the basis that Carol House, driving on a 35-mile-per-hour road, passed another vehicle at about 45 miles per hour and although she slacked speed somewhat before the explosion, she was traveling at the time of the impact in excess of the 35-mile-per-hour limit. The trial court submitted both contributory negligence and negligence to the jury, declared the maximum speed limit on Capitol Lake Drive to be 35 miles per hour, and told the jury that, although violation of a positive statute is negligence as a matter of law, it would not engender liability unless the violation proximately contributed to the injury. From a judgment entered upon a verdict for defendants, plaintiff appealed to the Court of Appeals which affirmed. 3 W. App. 231, 473 P.2d 445 (1970). We granted review (78 Wn.2d 991 (1970)), and reverse.

In the Court of Appeals, the principal claim of error was directed to the trial court's refusal to give an instruction on *res ipsa loquitur*, and we think that claim of error well taken. Our reasons for ruling that an instruction on *res ipsa loquitur* should have been given and that an inference of negligence could have been drawn from the event are found, we believe, in our statements on the subject: *Ze-*

Barth v. Swedish Hosp. Medical Center, 81 Wn.2d 12, 499 P.2d 1 (1972); *Miles v. St. Regis Paper Co.*, 77 Wn.2d 828, 467 P.2d 307 (1970); *Douglas v. Bussabarger*, 73 Wn.2d 476, 438 P.2d 829 (1968); *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967). We think, therefore, that plaintiff was entitled to an instruction permitting the jury to infer negligence from the occurrence.

But there exists here an even more impelling basis for liability in this case than its derivation by allowable inference of fact under the *res ipsa loquitur* doctrine, and that is the proposition of strict liability arising as a matter of law from all of the circumstances of the event.

Strict liability is not a novel concept; it is at least as old as *Fletcher v. Rylands*, L.R. 1 Ex. 265, 278 (1866), *affirmed*, House of Lords, 3 H.L. 330 (1868). In that famous case, where water impounded in a reservoir on defendant's property escaped and damaged neighboring coal mines, the landowner who had impounded the water was held liable without proof of fault or negligence. Acknowledging a distinction between the natural and non-natural use of land, and holding the maintenance of a reservoir to be a nonnatural use, the Court of Exchequer Chamber imposed a rule of strict liability on the landowner. The ratio decidendi included adoption of what is now called *strict liability*, and at page 278 announced, we think, principles which should be applied in the instant case:

> [T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its excape.

All of the Justices in *Fletcher v. Rylands, supra*, did

not draw a distinction between the natural and nonnatural use of land, but such a distinction would, we think, be irrelevant to the transportation of gasoline. The basic principles supporting the *Fletcher* doctrine, we think, control the transportation of gasoline as freight along the public highways the same as it does the impounding of waters and for largely the same reasons. *See* Prosser, *Torts*, §78 (4th ed. 1971).

In many respects, hauling gasoline as freight is no more unusual, but more dangerous, than collecting water. When gasoline is carried as cargo—as distinguished from fuel for the carrier vehicle—it takes on uniquely hazardous characteristics, as does water impounded in large quantities. Dangerous in itself, gasoline develops even greater potential for harm when carried as freight—extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties. And the very hazards inhering from the size of the load, its bulk or quantity and its movement along the highways presents another reason for application of the *Fletcher v. Rylands*, *supra*, rule not present in the impounding of large quantities of water—the likely destruction of cogent evidence from which negligence or want of it may be proved or disproved. It is quite probable that the most important ingredients of proof will be lost in a gasoline explosion and fire. Gasoline is always dangerous whether kept in large or small quantities because of its volatility, inflammability and explosiveness. But when several thousand gallons of it are allowed to spill across a public highway—that is, if, while in transit as freight, it is not kept impounded—the hazards to third persons are so great as to be almost beyond calculation. As a consequence of its escape from impoundment

and subsequent explosion and ignition, the evidence in a very high percentage of instances will be destroyed, and the reasons for and causes contributing to its escape will quite likely be lost in the searing flames and explosions.

That this is a sound case for the imposition of a rule of strict liability finds strong support in Professor Cornelius J. Peck's analysis in *Negligence and Liability Without Fault in Tort Law*, 46 Wash. L. Rev. 225 (1971). Pointing out that strict liability was imposed at common law prior to *Fletcher v. Rylands, supra*, that study shows the application of a rule of strict liability in a number of instances, *i.e.*, for harm done by trespassing animals; on a bona fide purchaser of stolen goods to their true owner; on a bailee for the misdelivery of bailed property regardless of his good faith or negligence; and on innkeepers and hotels at common law. But there are other examples of strict liability: The Supreme Court of Minnesota, for example, imposed liability without fault for damage to a dock inflicted by a ship moored there during a storm. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

The rule of strict liability rests not only upon the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible, but it also rests on problems of proof:

> One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied. For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried

> on. Certainly this is true with explosions of dynamite, large quantities of gasoline, or other explosives. It frequently is the case with falling aircraft. Tracing the course followed by gases or other poisons used by exterminators may be difficult if not impossible. The explosion of an atomic reactor may leave little evidence of the circumstances which caused it. Moreover, application of such a standard of liability to activities which are not matters of common experience is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.
>
> Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard.

(Footnote omitted.) C. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 Wash. L. Rev. 225, 240 (1971).

See, also, G. P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972), for an analysis of the judicial philosophy relating to tort liability as affecting or affected by concepts of fault and negligence; and Comment, *Liability Without Faults Logic and Potential of a Developing Concept*, 1970 Wis. L. Rev. 1201.

Thus, the reasons for applying a rule of strict liability obtain in this case. We have a situation where a highly flammable, volatile and explosive substance is being carried at a comparatively high rate of speed, in great and dangerous quantities as cargo upon the public highways, subject to all of the hazards of high-speed traffic, multiplied

by the great dangers inherent in the volatile and explosive nature of the substance, and multiplied again by the quantity and size of the load. Then we have the added dangers of ignition and explosion generated when a load of this size, that is, about 5,000 gallons of gasoline, breaks its container and, cascading from it, spreads over the highway so as to release an invisible but highly volatile and explosive vapor above it.

Danger from great quantities of gasoline spilled upon the public highway is extreme and extraordinary, for any spark, flame or appreciable heat is likely to ignite it. The incandescent filaments from a broken automobile headlight, a spark from the heat of a tailpipe, a lighted cigarette in the hands of a driver or passenger, the hot coals from a smoker's pipe or cigar, and the many hot and sparking spots and units of an automobile motor from exhaust to generator could readily ignite the vapor cloud gathered above a highway from 5,000 gallons of spilled gasoline. Any automobile passing through the vapors could readily have produced the flames and explosions which killed the young woman in this case and without the provable intervening negligence of those who loaded and serviced the carrier and the driver who operated it. Even the most prudent and careful motorist, coming unexpectedly and without warning upon this gasoline pool and vapor, could have driven into it and ignited a holocaust without knowledge of the danger and without leaving a trace of what happened to set off the explosion and light the searing flames.

Stored in commercial quantities, gasoline has been recognized to be a substance of such dangerous characteristics that it invites a rule of strict liability—even where the hazard is contamination to underground water supply and

not its more dangerous properties such as its explosiveness and flammability. *See Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969). It is even more appropriate, therefore, to apply this principle to the more highly hazardous act of transporting it as freight upon the freeways and public thoroughfares.

Recently this court, while declining to apply strict liability in a particular case, did acknowledge the suitability of the rule in a proper case. In *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, 80 Wn.2d 59, 491 P.2d 1037 (1971), we observed that strict liability had its beginning in *Fletcher v. Rylands, supra*, but said that it ought not be applied in a situation where a bursting water main, installed and maintained by the defendant Port of Seattle, damaged plaintiff telephone company's underground wires. There the court divided—not on the basic justice of a rule of strict liability in some cases—but in its application in a particular case to what on its face was a situation of comparatively minor hazards. Both majority and dissenting justices held, however, that the strict liability principles of *Fletcher v. Rylands, supra*, should be given effect in some cases; but the court divided on the question of whether underground water mains there constituted such a case.

The rule of strict liability, when applied to an abnormally dangerous activity, as stated in the *Restatement (Second) of Torts* §519 (Tent. Draft No. 10, 1964), was adopted as the rule of decision in this state in *Pacific Northwest Bell Tel. Co. v. Port of Seattle, supra*, at 64, as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity,

although he has exercised the utmost care to prevent such harm.

(2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

As to what constitutes an abnormal activity, section 520 states:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) Whether the activity involves a high degree of risk of some harm to the person, land or chattles of others;

(b) Whether the gravity of the harm which may result from it is likely to be great;

(c) Whether the risk cannot be eliminated by the exercise of reasonable care;

(d) Whether the activity is not a matter of common usage;

(e) Whether the activity is inappropriate to the place where it is carried on; and

(f) The value of the activity to the community.

Applying these factors to this system, we do not find the activity to be abnormally dangerous. There has never been a break in the system before, absent an earthquake, and the pipe could have been expected to last many more years. It is a system commonly used for fire protection, and its placement under ground is, of course, appropriate. We do not find section 519 of the Restatement (Tent. Draft No. 10, 1964), or *Rylands v. Fletcher, supra,* applicable.

It should be noted from the above language that we rejected the application of strict liability in *Pacific Northwest Bell Tel. Co. v. Port of Seattle, supra,* solely because the installation of underground water mains by a municipality was not, under the circumstances shown, an abnormally dangerous activity. Had the activity been found abnormal-

ly dangerous, this court would have applied in that case the rule of strict liability.

Contrast, however, the quiet, relatively safe, routine procedure of installing and maintaining and using underground water mains as described in *Pacific Northwest Bell v. Port of Seattle, supra,* with the activity of carrying gasoline as freight in quantities of thousands of gallons at freeway speeds along the public highway and even at lawful lesser speeds through cities and towns and on secondary roads in rural districts. In comparing the quiescence and passive job of maintaining underground water mains with the extremely heightened activity of carrying nearly 5,000 gallons of gasoline by truck, one cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity and on its face possesses all of the factors necessary for imposition of strict liability as set forth in the *Restatement (Second) of Torts* §519 (Tent. Draft No. 10, 1964), above.

Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care. That gasoline cannot be practicably transported except upon the public highways does not decrease the abnormally high risk arising from its transportation. Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier's equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all of the other hazards not generally disclosed or guarded against by reasonable care, prudence

and foresight. Hauling gasoline in great quantities as freight, we think, is an activity that calls for the application of principles of strict liability.

The case is therefore reversed and remanded to the trial court for trial to the jury on the sole issue of damages.

/s/ HALE, J.

WE CONCUR:

/s/ HAMILTON, C. J.
/s/ FINLEY, J.
/s/ ROSELLINI, J.
/s/ HUNTER, J.
/s/ RYAN, J. Pro tem

ROSELLINI, J. (concurring)—I agree with the majority that the transporting of highly volatile and flammable substances upon the public highways in commercial quantities and for commercial purposes is an activity which carries with it such a great risk of harm to defenseless users of the highway, if it is not kept contained, that the common-law principles of strict liability should apply. In my opinion, a good reason to apply these principles, which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers—who benefit from this extrahazardous use of the highways. Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account.

I think the opinion should make clear, however, that the owner of the vehicle will be held strictly liable only for damages caused when the flammable or explosive substance is allowed to escape without the apparent interven-

tion of any outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling it. I do not think the majority means to suggest that if another vehicle, negligently driven, collided with the truck in question, the truck owner would be held liable for the damage. But where, as here, there was no outside force which caused the trailer to become detached from the truck, the rule of strict liability should apply.

It also is my opinion that the legislature has expressed an intent that owners and operators of vehicles carrying trailers should be required to keep them under control, and that intent can be found in the statutes cited in the majority opinion. Thus the application of the common-law principles of strict liability is in accord with the manifest legislative view of the matter.

It also should be remarked, I think, that there was in this case no evidence that the alleged negligence of the deceased, in driving faster than the posted speed, was in any sense a proximate cause of the tragedy which befell her. There was no showing that, had she been proceeding at the legal rate of speed, she could have stopped her vehicle in time to avoid being enveloped in the flames or that the gasoline would not have ignited. Thus we are not confronted in this case with a question whether contributory negligence might under some circumstances be a defense to an action of this kind. It should be understood that the court does not pass upon that question at this time.

/s/ ROSSELLINI, J.
We concur
/s/ FINLEY, J.
/s/ RYAN, J., Pro tem
/s/ HAMILTON, J.

NEILL, J. (dissenting)—The application of the doctrine of strict liability to the facts of this case is warranted, at least as the applicablity is qualified by the concurring opinion of Justice Rosellini. However, to decide this case on that theory violates our established rules of appellate review. *National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wn.2d 124, 309 P.2d 742 (1957); *State v. McDonald*, 74 Wn.2d 474, 445 P.2d 345 (1968).

Plaintiff seeks money redress for the death of an exemplary young woman whose life was horribly terminated in a tragic accident. A jury absolved the defendants from culpability. Irrespective of our sympathy, that jury verdict must stand unless error was committed at the trial. On appeal, the Court of Appeals affirmed the verdict and judgment. *Siegler v. Kuhlman*, 3 Wn. App. 231, 473 P.2d 445 (1970). We granted review. 78 Wn.2d 991 (1970).

The only issue brought to this court by the appeal is the procedural effect of *res ipsa loquitur*. Before discussing that issue, I will address other portions of the majority and concurring opinions with which I am in disagreement.

The injection of the issue of the applicability and construction of RCW 46.44.070 is improper. The issue was not raised at trial, nor in the Court of Appeals. Following the granting of a petition for review, this court, *sua sponte*, requested counsel to submit supplemental briefs as to the statute. This is an appellate procedure to which I have previously expressed my dissent. *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 625, 465 P.2d 657 (1970).[1] My dis-

1. Both the majority and dissenting opinions in *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 625, 465 P.2d 657 (1970), recognize several exceptions to the general rule that appellate courts will not consider a theory or issue which was not presented by the litigants. *See generally* 5 Am. Jur. 2d *Appeal and Error* §§ 545-552. However, none of these exceptions justify the injection of these issues by this court in this case.

agreement with such judicial usurpation of an adversary function is even stronger here, where the meaning ascribed to the statute in focus depends upon an interpretation which that statute has not heretofore received. The majority opinion assumes that the language of RCW 46.44.070 requiring the trailer "connection . . . [to] be of sufficient strength to hold the weight of the towed vehicle on any grade where operated" applies to situations where the trailer breaks away to the side of the towing vehicle. Whether or not that interpretation should be applied to the statute is a question that should await a case where the issue is timely and properly presented.

Further, RCW 46.44.070, even as read by the majority, cannot be applied here without first assuming as fact that the connection was not secure. In this case that assumption is an inappropriate trespass on the jury's function. As the majority notes, the question of whether the connection came loose because improperly secured is raised by circumstantial evidence. In fact, much of the trial was directed to expert testimony as to whether the trailer connection first came loose or whether the breaking of a supporting spring caused the ultimate separation of the connection. Thus any answer to that question is properly the subject of the jury's consideration from the evidence and reasonable inference from the circumstantial evidence. Unless we are prepared to hold that the statute makes the operator of a truck and tractor rig a guarantor of the security of the connection under all circumstances, we cannot state that the answer is a matter of certitude.

The jury was instructed on contributory negligence. No exception was taken nor has error been assigned to the

instruction. Yet, the concurring opinion, *sua sponte*, questions the giving of the instruction. It has been my understanding that an instruction to which error is not assigned becomes the law of the case. *E.g., Kindelspire v. Lawrence*, 44 Wn.2d 722, 270 P.2d 477 (1954); *Ralston v. Vessey*, 43 Wn.2d 76, 260 P.2d 324 (1953). I think it beyond the proper scope of appellate review to "try the case" for the parties.

I turn to the sole and only assignment of error presented to us: that the jury should have been given one of two *res ipsa loquitur* instructions proposed by plaintiff. The applicability of that doctrine to the facts of this case is not contested and is not in issue here. The question is the procedural effect to be given that doctrine in the case at hand. I disagree with the treatment that the majority has given to this question and adhere to the lead opinion in *Zukowsky v. Brown*, 79 Wn.2d 586, 488 P.2d 269 (1971). First, the majority opinion chooses to ignore, rather than grapple with, the serious and difficult problems associated with the question of the procedural effect to be given *res ipsa loquitur*. *See Zukowsky v. Brown, supra*, and authorities therein cited. *Also see Siegler v. Kuhlman*, 3 Wn. App. 231, 473 P.2d 445 (1970). In consequence, the majority decision, as to this point, contributes nothing to the body of law, and yields only a *sui generis* result. Having refused to meet the problem, the majority cannot be read as either enhancing, diminishing, or altering answers arrived at in cases where the issue has been met.[2]

In addition, plaintiff's proposed instructions on *res ipsa*

2. In this respect, the Court of Appeals commendably met and discussed the problem. *Siegler v. Kuhlman*, 3 Wn. App. 231 240-244, 473 P.2d 445 (1970).

were defective. Each proposed instruction contains language criticized in *Clark v. Icicle Irrigation Dist.*, 72 Wn.2d 201, 203, 432 P.2d 541 (1967):

> We particularly disagree with the statement that "the happening of the accident alone affords reasonable evidence . . . that the accident arose from the want of reasonable care." We have been at some pains to make it clear that the happening does not afford "reasonable evidence"; that it does no more than permit the jury to infer, though it is not required to so infer, that the defendant or its agents were at some point negligent.
>
> See recent discussion in *Pederson v. Dumouchel*, [72 Wn.2d 73], 431 P.2d 973 (1967).

Plaintiff's first assignment of error is the trial court's failure to give a requested instruction stating:

> You are instructed that when a thing which causes an injury to another is shown to be under the management and control of the person charged with negligence in operation or maintenance of such thing, or in the failure to keep it in a reasonably safe condition, and if it is shown that an accident happened, which in the ordinary course of things, does not happen if those in charge of the management and maintenance of thing exercised reasonable care, then *the happening of the accident alone affords reasonable evidence* in the absence of explanation by the person charged with negligence *that the accident arose from want of reasonable care* on the part of such persons. (Italics mine.)

Plaintiff's second, and only other, assignment of error is the failure to give an instruction stating:

> You are instructed that when an object which causes an injury to another is shown to be under the management and control of a person charged with negligence in the operation of such thing, or in the failure to keep it in a reasonably safe condition and if it is shown that the incident happened which in the ordi-

> nary course of things does not happen, if those in charge of this management and control exercise reasonable care, then *the happening of said occurrence affords reasonable evidence,* in the absence of an explanation by the person charged with negligence, *that the occurrence arose from the want of reasonable care* on the part of such person. (Italics mine.)

Thus plaintiff's proposed *res ipsa* instructions were defective by including the "affords reasonable evidence" language criticized in *Clark.*[3] A trial court need not give an erroneous instruction. *State v. Wilson,* 26 Wn.2d 468, 174 P.2d 553 (1946).

I would affirm the trial court and the Court of Appeals.

/s/ NEILL, J.

I concur

/s/ STAFFORD, J.

3. This distinction between evidence and inference is supported by eminent writers in the field. *E.g.,* Wigmore, Evidence (3d ed. 1940) § 1(b), "Argument and Evidence, distinguished," and § 30.

APPENDIX B

[FILE
In Clerk's Office
Court of Appeals
State of Washington - Division I
Date August 17, 1970
/s/ FRANK D. JAMES
Chief Judge]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MRS. JACOB SIEGLER, Individually and as Administratrix of the Estate of Carol J. House, Deceased, *Appellant*, v. AARON L. KUHLMAN and "Jane Doe" KUHLMAN, husband and wife, PACIFIC INTERMOUNTAIN EXPRESS CO., a corporation, *Respondents*, TRUCK INSURANCE EXCHANGE, a corporation,[1] *Defendant*.	No. 417-40819-I Division One Panel One Filed Aug. 17, 1970

SWANSON, J.—Mrs. Jacob Siegler sued Pacific Intermountain Express Co. (P.I.E.) and its driver Arron L. Kuhlman for the wrongful death of her daughter Carol J. House. She claimed her daughter's death was caused by their negligence. The jury returned a verdict for the defendants. Plaintiff moved for a judgment n.o.v. or, in the alternative, for a new trial. Both motions were denied, and this appeal follows.

At about 6 p.m. on the evening of November 22, 1967, Aaron Kuhlman checked the tires, hitch assembly, brakes, and lights of a P.I.E. truck-trailer tanker rig whose tanks

1. Although Truck Insurance Exchange filed an answer, the record is silent as to further participation or the present status of this defendant.

had just received a capacity load of gasoline.[2] He stopped 5 minutes for a cup of coffee at the Trail's End Cafe in Tumwater, Washington, and then drove into the northbound lane of Interstate 5 toward Olympia, his destination being Port Angeles. It was dark when Kuhlman made a right turn from the freeway onto the ramp which connects Interstate Highway 5 to U. S. Highway 101 at the Capitol Lake Interchange, as he had done countless times before in making the trip to Port Angeles. He drove down the ramp at about 33 to 34 miles per hour,[3] felt a jerk and looked into his left mirror. He saw the trailer leaning to the right and applied the brakes. As he turned to the left in following the circular off-ramp of the interchange,[4] the trailer separated from its front wheel assembly, veered to the right, plunged through a Cyclone fence, overturned, and came to rest upside down on Capitol Lake Drive.[5] The trailer tanker was now without lights, lying in the roadway concealed by the darkness.

Meanwhile, plaintiff's 17-year-old daughter, Carol House, a Tumwater High School senior, had finished her after-school job and started on the ill-fated drive toward her home. She turned onto Capitol Lake Drive, as was her custom, oblivious to the peril ahead. Miss House passed a

2. The truck's tank was loaded with 3,800 gallons of gasoline, and the trailer's tank with 4,800 gallons of gasoline.

3. Instruction 10 stated: "You are instructed that there is, as such, no speed limit on the offramp here in question. The 30 m.p.h. sign is an advisory sign, showing a reasonable speed for normal conditions of weather and lighting and it is not intended as an enforceable limit. No error was assigned to this instruction, and it became the law of the case.

4. The offramp proceeds in a circular direction, turns first to the right, goes under Interstate 5, and then curves to the left with the roadway slightly banked.

5. Capitol Lake Drive is adjacent to but several feet higher than the interchange offramp. The two roadways are separated by a heavy wire mesh fence described as a "Cyclone" fence.

slower vehicle as she approached the site of the overturned trailer and was traveling at approximately 45 miles per hour when she rounded the last curve.[6] Kuhlman and other witnesses saw the headlights of her approaching car and tried in vain to call her attention to the danger. She attempted to stop, but her vehicle struck the wire mesh fencing in the roadway,[7] breaking the left front headlight of her car. Almost instantaneously the gasoline exploded, and Carol House was killed.

The trial court outlined for the jury plaintiff's claim that defendants' negligence caused the death of Carol House. Defendants denied this and claimed the death was caused by her own contributory negligence. The court gave instructions defining negligence and contributory negligence.

Plaintiff requested two instructions explaining the doctrine of res ipsa loquitur. Both were refused. Plaintiff claims the failure to give either instruction constitutes reversible error.

Plaintiff contended below, and the trial court agreed, that this is a "res ipsa loquitur case." The trial judge then explained why he refused to instruct the jury on the doctrine by saying:

> I would say the Court in not giving that [the requested res ipsa liquitur instructions] was relying entirely upon the statement in the Washington Pattern Instructions, . . .[8]

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6. The court's instruction 9 stated: "You are instructed that the speed limit on Capitol Lake Drive was 35 m.p.h."

7. The impact of the trailer broke the fence, and a portion of it was dragged into the roadway.

8. The Washington Supreme Court Committee on Jury Instructions has recommended that no instruction be given on res ipsa loquitur. Ball v. Mudge, 64 Wn.2d 247, 391 P.2d 201 (1964); Crippen v. Pulliam, 61 Wn.2d 725, 380 P.2d 475 (1963); Chase v. Beard, 55 Wn.2d 58, 346 P.2d 315 (1959). Those cases support the view that

Plaintiff argues that, given a res ipsa loquitur case, the present rule in Washington requires that the jury be instructed on the doctrine in the absence of a complete and undisputed explanation of the event. Defendants contend to the contrary.

Assuming arguendo the prerequisites[9] for the application of res ipsa loquitur are present here, two principal issues remain: (1) whether it was error *in this case* to refuse to instruct the jury on res ipsa, and (2) whether plaintiff's requested instructions were correct statements of the doctrine. As stated in W. Prosser, Torts § 40 at 232 (3d ed. 1964):

> There is more agreement as to the type of case to which res ipsa loquitur is applicable than as to its procedural effect when it is applied.

Each party cites a line of cases supporting their respective arguments. This apparent inconsistency was recognized in *Douglas v. Bussabarger*, 73 Wn.2d 476, 487, 438 P.2d 829 (1968), where the court said:

> We have in this jurisdiction two lines of cases con-

> the function of the res ipsa loquitur doctrine is merely to permit the party to get by a non-suit and that once the doctrine has been so employed to get the case to the jury, there is no special reason why the jury should be told what inferences it may draw any more than in any other case. See Wiehl, Instructing a Jury in Washington, 36 Wash. L. Rev. 378 (1961).
>
> WPI 22.01.

9. The criteria governing application of the doctrine of res ipsa loquitur were most recently defined in *Miles v. St. Regis Paper Co.*, 77 W.D.2d 840, 844, 467 P.2d 307 (1970):

> The three prerequisites to application of the doctrine are: (1) an event which ordinarily does not occur unless someone is negligent; (2) the agency or instrumentality causing the event must be within the exclusive control of the defendant; and (3) there must be no voluntary action or contribution to the event on the part of the plaintiff. *Douglas v. Bussabarger*, 73 Wn.2d 476, 438 P.2d 829 (1968); *Emerick v. Mayr*, 39 Wn.2d 23, 234 P.2d 1079 (1951); W. Prosser, Torts § 42, at 208 (2d ed. 1955).

> cerning the res ipsa loquitur doctrine, one of which is represented by *Ball v. Mudge*, 64 Wn.2d 247, 391 P.2d 201 (1964), which states that res ipsa loquitur is not a rule of law but a rule of evidence and that it never requires a jury instruction, but serves only to get a plaintiff past a nonsuit. . . .
>
> The other line of cases is exemplified by *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.* [62 Wn.2d 351, 382 P.2d 518 (1963)], which approved an instruction on circumstantial evidence which, *inter alia*, advised the jury of its right to infer negligence when the plaintiff's evidence showed that the injury was one which ordinarily would not have occurred without negligence.

Plaintiff argues that our Supreme Court has abandoned the rule declared in *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315 (1959), approved and reiterated in *Ball v. Mudge*, 64 Wn.2d 247, 391 P.2d 201 (1964),[10] and accepted by the Washington Supreme Court Committee on Jury Instructions[11] that res ipsa loquitur never requires a jury instruction. The departure was begun, plaintiff says, in *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wn.2d 351, 382 P.2d 518 (1963), when the doctrine was held applicable to take the case to the jury under the evidence and support a verdict, and made complete in *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967), and

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10. *But see, Douglas v. Bussabarger, supra* at 497 (Rosellini, J. dissenting): "I will assume the latter case [*Ball v. Mudge, supra*] has been overruled, albeit *sub silentio*."

11. The Supreme Court, in a letter of explanation to the members of the Washington Bench and Bar, dated October 3, 1966, stated in part as follows:

> The pattern jury instructions, on their own merits, will have great persuasive force, and we recommend their use. However, it should be remembered that the Supreme Court cannot and does not approve in advance jury instructions which may be given in any particular lawsuit. Trial lawyers should keep this in mind in evaluating these pattern instructions.

WPI IX.

Douglas v. Bussabarger, supra, by the approval in those cases of an instruction to the jury on the doctrine.

Even though an instruction defining res ipsa loquitur was approved in *Douglas,* the procedural effect and primary purpose of the doctrine as defined in *Chase* and *Ball* was recognized when the court said in *Douglas,* 73 Wn.2d at 487:

> It is important to emphasize that the effect of our decision is not to make doctors "insurers," nor to make it impossible for them to defend themselves in malpractice cases. On the contrary, the function of the doctrine of res ipsa loquitur is only to prevent a nonsuit, not to decide the case. Doctors still have an opportunity if they so choose to come forward with evidence as to exactly what did take place in the operating room and thereby seek to avoid liability.

The court, in *Horner,* 62 Wn.2d at 359, cited with approval a rule familiar to many prior cases:

> We have declared the rule in near original form, supported by a plethora of authority, in the following language:
>
> "This doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception to, or perhaps more accurately a qualification of, the general rule that negligence is not to be presumed, but must be affirmatively proved. By virtue of the doctrine, the law recognizes that an accident, or injurious occurrence, may be of such nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof, thus casting upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part [Citing cases.]" *Morner v. Union Pac. R. Co.,* 31 Wn. (2d) 282, 196 P. (2d) 744.

The doctrine of res ipsa loquitur is then a rule of evidence which, when applied in a proper case, permits an inference of negligence from the occurrence itself. The duty to come forward with an exculpatory explanation rebutting or otherwise overcoming the inference is then cast upon the defendant, but the procedural application of res ipsa loquitur does not shift the burden of proof, only the duty of going forward with the evidence shifts to the defendant. *Covey v. Western Tank Lines, Inc.*, 36 Wn.2d 381, 218 P.2d 322 (1950); *Hardman v. Younkers*, 15 Wn.2d 483, 131 P.2d 177 (1942); *Briglio v. Holt & Jeffrey*, 85 Wash. 155, 147 P. 877 (1915).

If the defendant comes forth with a conclusive exculpatory statement or explanation of what happened, the doctrine does not apply, and it would be error to give an instruction. *Vogreg v. Shepard Ambulance Service, Inc.*, 47 Wn.2d 659, 289 P.2d 350 (1955); *Morner v. Union Pac. R. Co.*, 31 Wn.2d 282, 196 P.2d 744 (1948). A purpose of the doctrine is to force the defendant, who usually is in a better position to explain what happened, to come forward with an explanation. As stated in W. Prosser, Torts § 40 at 234 (3d ed. 1964):

> There is, in other words, a deliberate policy of "smoking out" evidence which the defendant has or can get.

See Carpener, *The Doctrine of Res Ipsa Loquitur in California*, 10 So.Cal. L. Rev. 166 (1937). If he does, and it is complete, the reason supporting the rule is eliminated. This analysis is well expressed in *Covey v. Western Tank Lines, Inc.*, 36 Wn.2d at 391:

> However, if the evidence submitted by either or both parties is so completely explanatory of how the accident occurred that no inference is left that the acci-

> dent may have happened in any other way, there is nothing left upon which the doctrine need or can operate. [Citations omitted.]

The plaintiff's evidence tended to show that the defendants' driver Kuhlman drove faster around the curve than the posted advisory speed limit. From this evidence, the trier of the fact could infer that the speed was excessive under the circumstances which caused the trailer to lean heavily to one side and place undue pressure upon the springs. Because of this stress, the springs broke resulting in the trailer overturning. From this evidence and the inferences deducible from it, the plaintiff claims the defendants were guilty of negligence proximately creating the condition of hazard which caused the fatal injuries to Miss House. Does this proof fully explain how the accident happened? If it does, plaintiff loses the right to rely on res ipsa loquitur.

This rule was stated in *Kemalyan v. Henderson*, 45 Wn.2d 693, 704, 277 P.2d 372 (1954):

> The correct rule is that a plaintiff will be bound by the testimony of his own witnesses as to how an accident causing injury occurred and can no longer rely on *res ipsa loquitur* when his evidence, if believed by the jury, will fully explain how the injury was inflicted.

Plaintiff offered no direct evidence as to why the truck "jerked," as Kuhlman testified it did just before the accident, nor why the springs broke, nor why broken springs should cause the trailer to separate from its front wheels and from the truck towing it. The plaintiff's expert witness, Dr. Morgan, a metallurgist, said that he could not tell by his examination whether there was a prior break in the springs, and said:

> No, I could see no evidence of a fatigue failure or prior damage to the spring before the ultimate failure.

He also said:

> Well, I have not seen anything which would indicate a mechanical failure.

And concluded by admitting:

> it would . . . be a driving failure . . . going too fast or jerked it or did something that shouldn't have been done that made the trailer tip.

Plaintiff's evidence does not purport to furnish a complete explanation of the occurrence, so that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendants does not destroy the inferences which are consistent with the evidence to deprive the plaintiff of the benefit of the doctrine. See Prosser, Torts at 236; *Clark v. Icicle Irr. Dist.*, 72 Wn.2d 201, 432 P.2d 541 (1967); *Vogreg v. Shepard Ambulance Service, Inc., supra.*

Defendants offered their explanation by presenting evidence that Kuhlman operated his truck around the curved offramp of the interchange in a careful manner, as he had done hundreds of times previously. He testified:

> [I saw] the trailer laying over hard on its righthand —or to the right.

Evidence was presented that it would be impossible to lean the tanker over far enough to touch the wheels of the trailer without the springs breaking.

The state patrol officer, Trooper Wiles, testified he examined the two broken mainsprings and observed that the breaks in them were fresh. He said he did not think the accident was caused by driver error. He blamed it on

spring breakage. Defendants' chief maintenance man, Dave Palumbo, testified that a fatigue fracture in a spring could not be seen, and admitted,

> the springs broke . . . because they were exerted . . . beyond their capacity.[12]

Uncontroverted evidence was then presented which indicated that a failure of both mainsprings is virtually unheard of. The defendants' maintenance experts claimed that they followed the procedure and practice of regular inspection and maintenance.

Defendants' explanation of the accident was that the failure of the springs caused the trailer to overturn. The springs broke, defendants claim, because undue stress was placed upon them which was unpredictable, or because of a defect which was both undiscoverable and impossible to prevent by either reasonable inspection or regular maintenance. Defendants' evidence rebutted the inferences permitted by the doctrine and, if believed, is enough to overcome the *prima facie* case established by plaintiff's evidence and the use of the doctrine. *Nopson v. Wockner*, 40 Wn.2d 645, 245 P.2d 1022 (1952). But does it completely explain the cause of the occurrence? If it does, the doctrine should not be submitted to the jury. *Engen v. Arnold*, 61 Wn.2d 641, 379 P.2d 990 (1963); *Emerick v. Mayr*, 39 Wn.2d 23, 234 P.2d 1079 (1951).

It is not disputed that the springs broke, but the evidence was in conflict and left an uncertainty as to why this happened. Doubts remain as to whether the springs broke

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12. See *Kemalyan v. Henderson*, 45 Wn.2d 693, 704, 277 P.2d 372 (1954), for a discussion of the problem presented when the defendant, in his effort to explain the cause, introduced evidence of some specific act of negligence. See also, 33 A.L.R.2d 799 (1954).

because of metal fatigue, excessive stress placed upon them, or a latent defect in the springs, and as to whether or not such defect would be discoverable by reasonable inspection. This being so, it cannot be said that the evidence so completely explained how the accident occurred that there is nothing left upon which the doctrine can operate. *Covey v. Western Tank Lines, Inc. supra.*

Defendants argue that an instruction is nevertheless not necessary because they presented evidence sufficient to rebut plaintiff's proof and the *prima facie* case established against them with the aid of the doctrine.

It must be remembered that whether or not the doctrine is to be applied in a particular case depends upon its peculiar facts and circumstances. *McClellan v. Schwartz*, 97 Wash. 417, 166 P. 783 (1917). Its scope is limited and should be applied only where the facts and the demands of justice make its use essential. *Morner v. Union Pac. R. Co., supra.* Our court, in *Emerick v. Mayr*, 39 Wn.2d at 25, stated:

> However, the doctrine is a rule of necessity to be invoked only where direct evidence of negligence is absent and unavailable.

With this admonition in mind, we review plaintiff's cases and the factors bearing upon the necessity of an instruction on the doctrine in this case.

In *Horner*, the plaintiff underwent a hysterectomy and awakened thereafter with a paralyzed arm. The defendant doctor gave no explanation to show what happened, nor evidence of causation, but limited his explanation to the many ways in which the paralysis could occur. The court said this did not amount to an explanation of the accident

and held that the *res ipsa* rule applied so that there was evidence from which the jury could infer negligence to support the verdict.

In *Pederson*, the plaintiff had fractured his jaw in an automobile accident and in order to reduce the fracture was administered an anesthetic from which he did not awaken for almost a month, and then with apparent brain damage. As in *Horner*, the court determined that the result was such an extraordinary occurrence as to raise an inference of negligence and, in the absence of a satisfactory explanation, approved an instruction on *res ipsa loquitur* which permitted the jury to infer negligence.

In *Douglas*, the paralysis of a patient was involved following an operation to repair a stomach ulcer. The majority opinion carefully pointed out that four of five possible causes involved the negligence of the defendant doctor which supported a finding that the result was one which does not ordinarily occur in the absence of negligence. The court then said the line of cases exemplified by *Horner* applied and approved the instruction on *res ipsa loquitur*. In so doing, the court recognized that justice made it essential that an instruction be given in the case.[13] This factor was recognized when the court said in *Douglas*, 73 Wn.2d at 485:

> Under the circumstances, we do not believe plaintiff should have been denied the aid of the doctrine of

13. Policy considerations may be involved in malpractice cases such as *Horner*, *Pederson* and *Douglas*, for, as observed in W. Prosser, Torts § 39 at 235 (3d ed. 1964):

> There may perhaps be other such relations [an action by a passenger against his carrier], such as that of physician and patient, where special conclusions are called for. Apart from such instances, however, remarkably few jurisdictions now treat res ipsa loquitur as anything more than a simple matter or circumstantial evidence.

(Footnotes omitted.)

> res ipsa loquitur. Were we to hold otherwise, patients who suffer injury or disability while being operated upon will be unable to recover damages if the doctor merely alleges that a mysterious, unexpected, and unexplainable reaction by the patient to treatment took place on a single, isolated occasion, even though there is other medical testimony from which a jury could reasonably conclude that the doctor was in fact negligent.

The most recent res ipsa loquitur case decided by our Supreme Court is *Miles v. St. Regis Paper Co.*, 77 W.D.2d 840, 467 P.2d 307 (1970). Claude Miles was crushed to death by one of three logs which rolled from the top of a railroad flat car. The court found that the defendant railroad company had exclusive control of the instrumentality causing the injurious occurrence.[14] The court concluded that logs are ordinarily loaded and unloaded without accident, so this accident gives rise to an inference that it did not occur without negligence on defendant's part.[15] Though the doctrine was held applicable in *Miles*, and a res ipsa loquitur instruction held not to be error, it did not receive approval in affirmative language, for the court said, 77 W.D.2d at 846:

> However, on the basis of the evidence brought out at the trial, *we cannot say that the instruction on res ipsa liquitur was error.*
> (Italics ours.)

In these cases, *Horner, Pederson, Douglas and Miles*, the doctrine was essential to plaintiff's recovery. This is

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14. See the dissent joined in by three justices concerning the issue of whether defendant railroad company had exclusive control of the instrumentality causing the injurious event so that the doctrine applied.

15. Reliance on common knowledge in finding certain conduct negligent is sharply questioned by some authorities. See 2 Harper & James, Law of Torts, 1079 (1956), and Morris, *Res Ipsa Loquitur in Texas*, 26 Texas L. Rev. 227 (1948).

consistent with the view expressed by a plethora of authorities that the doctrine ought to be used sparingly and only when justice makes its use essential. *Morner v. Union Pac. R. Co.*, 31 Wn.2d 282, 196 P.2d 744 (1948); *Engen v. Arnold*, 61 Wn.2d 641, 379 P.2d 990 (1963). In the instant case, plaintiff presented evidence of defendants' negligence which supported instructions on negligence and entitled plaintiff's case to go to the jury without the aid of the doctrine. Therefore, the inferences permissible from the happening itself were not essential to overcome a nonsuit (the primary function of the doctrine), *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315 (1959); *Douglas v. Bussabarger*, 73 Wn.2d 476, 438 P.2d 829 (1968), to support the verdict as in *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wn.2d 351, 382 P.2d 518 (1963), nor for plaintiff's claim of negligence to be fully considered by the jury as in *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967); *Douglas v. Bussabarger, supra*, and *Miles v. St. Regis Paper Co., supra.*

The doctrine is in part premised on the proposition that the defendant has superior knowledge of the happening or that the evidence as to the explanation of the accident is more accessible to the defendant than to the plaintiff. *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 P. 838 (1911); *Morner v. Union Pac. R. Co., supra.*[16] This was the situation in plaintiff's cases, for the injuries occurred while the plaintiffs were unconscious so that the defendant was in possession of most, if not all, of the facts and had

16. *See Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944), wherein the greater accessibility of the evidence to the defendant was an important factor in the decision. *But see*, 2 Harper & James, Law of Torts § 19.9 at 1094 (1956), and cases collected therein, for criticism of this requirement.

superior knowledge regarding them. See *Douglas v. Bussabarger, supra.* Here, substantially the same evidence was available to both parties for inspection and analysis.[17]

In those cases approving an instruction on the doctrine, the defendant failed to come forward with any satisfactory explanation of what happened to cause the injury. The defendant doctors were alone possessed of knowledge as to what occurred in the operating rooms but refused to accept the burden of explanation. Such is not the case here, for the defendants did come forward with an explanation of what happened, even though contradicted. The defense not only relied on a denial of plaintiff's claim of negligence and presented evidence of due care, but also affirmatively presented evidence to show the accident was caused by a mechanical failure which they could not have guarded against by the exercise of reasonable care. In addition, plaintiff's evidence supported an instruction on decedent's contributory negligence.[18] Insuch circumstances it would seem unfair to place special emphasis on the inferences of negligence permissible by application of res ipsa loquitur. Plaintiff's evidence should not be entitled a special treatment as a matter of law. To elevate the importance

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17. The only items not available for inspection by both parties were two pieces of broken spring lost by defendants' expert witness. No fault or blame was asserted against defendants for the loss of these items.

18. Error was not assigned to this instruction, but it should be noted that contributory negligence should not be confused with the third prerequisite for application of the doctrine—no voluntary action or contribution to the event on the part of the plaintiff. This prerequisite is allied to the requirement of control by the defendants. It does not involve contributory negligence to which defendants have the burden of proof. *Wydenes v. Dykstra,* 39 Wn.2d 756, 238 P.2d 1198 (1951). The deceased's actions after the event may have exposed her unnecessarily to the hazard, but they did not contribute to its occurrence. Such facts only go to support the contributory negligence instruction. See Prosser, Torts at 229; Harper & James, Law of Torts at 1094 n.3; and Morris, *Res Ipsa Loquitur in Texas,* 26 Texas L. Rev. 257, 270 (1948).

of plaintiff's evidence to the jury by the use of the requested instruction would necessarily result in a proportionate decline in the importance of defendants' evidence.[19] Here, the court gave a comprehensive instruction on circumstantial evidence[20] which, by its language, permits inferences of other and connected facts from certain proven facts and circumstances. An instruction on res ipsa loquitur as requested, we fear, would add more confusion than clarity to the jury's understanding of the law applicable to the case. Under the circumstances of the case the trial court correctly refused to give plaintiff's requested instructions on the doctrine.

But, even assuming an instruction on the doctrine was necessary, the instructions requested by plaintiff[21] are incorrect. It is not error for the trial court to refuse an

19. See Justice Neill's dissent in *Miles*, 77 W.D.2d 849 n.1:

"To add a special instruction on the res ipsa inference is to give that possible inference an unfair advantage over other possible inferences in the case."

20. The instruction on circumstantial evidence stated:

"Evidence is of two kinds—direct and circumstantial. In giving direct evidence, a witness testified directly of his own knowledge concerning facts to be proved. Circumstantial evidence is proof of certain facts and circumstances from which may be inferred other and connected facts which usually and reasonably follow according to the common experience of mankind.

"The value and weight of circumstantial evidence are to be determined from its character and nature and from its relation to all of the other facts otherwise established by the other evidence in the case. Nothing in the nature of circumstantial evidence renders it less valuable than other evidence." Instruction 15.

21. Proposed instruction:

"You are instructed that when a thing which causes an injury to another is shown to be under the management and control of the person charged with negligence in operation or maintenance of such thing, or in the failure to keep it in a reasonably safe condition, and if it is shown that an accident happened which, in the ordinary course of things, does not happen if those in charge of the management and maintenance of the thing exercise reasonable care, then the happening of the accident alone affords reasonable evidence in the absence of explanation by the person charged with negligence

instruction that is incorrect in any particular *Adams v. State*, 71 Wn.2d 414, 429 P.2d 109 (1967); *Robillard v. Selah-Moxee Irr. Dist.*, 54 Wn.2d 582, 343 P.2d 565 (1959). Plaintiff's requested instructions are taken from those found in *Clark v. Icicle Irr. Dist.*, 72 Wn.2d 201, 432 P.2d 541 (1967). The appellant in *Icicle* did not question either the form or the content of such instruction, but the court saw fit to state at 203 n.2:

> We desire to make it indubitably clear that, by quoting it, we are not approving the form of this instruction. We particularly disagree with the statement that "the happening of the accident alone affords reasonable evidence . . . that the accident arose from the want of reasonable care." We have been at some pains to make it clear that the happening does not afford "reasonable evidence"; that it does no more than permit the jury to infer, though it is not required to so infer, that the defendant or its agents were at some point negligent."

Judgment affirmed.

/s/ SWANSON, J.

WE CONCUR:

/s/ JAMES, C. J.

/s/ FARRIS, J.

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that the accident arose from the want of reasonable care on the part of such person."

Proposed instruction—

"You are instructed that when an object which causes an injury to another is shown to be under the management and control of a person charged with negligence in the operation of such thing or the failure to keep it in a reasonably safe condition, and if it is shown that the incident happened which in the ordinary course of things does not happen, if those in charge of this management and control exercise reasonable care, then the happening of said occurrence affords reasonable evidence, in the absence of an explanation by the person charged with negligence, that the occurrence arose from the want of reasonable care on the part of such person."

APPENDIX C

No. 40819

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MRS. JACOB SIEGLER, individually and as Administratrix of the Estate of Carol J. House, deceased,
Appellant,

v.

AARON L. KUHLMAN and "JANE DOE" KUHLMAN, husband and wife,
PACIFIC INTERMOUNTAIN EXPRESS CO., a corporation,
Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

HONORABLE CHARLES T. WRIGHT, *Judge*

PETITION FOR REHEARING

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IN THE SUPREME COURT
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Appellant,

v.

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Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

HONORABLE CHARLES T. WRIGHT, *Judge*

PETITION FOR REHEARING

TO: The Honorable Chief Justice Hamilton and the Associate Justices of the Supreme Court of the State of Washington:

The respondents, Aaron L. Kuhlman and Jane Doe Kuhlman, husband and wife, and Pacific Intermountain Express Co., a corporation, present this petition for a rehearing of the above cause, and, in support thereof, respectfully show:

1. The appeal in the cause was argued before this Court on June 8, 1971.

2. On November 15, 1972, this Court rendered its decision in favor of the petitioner, and against the respondents, reversing the judgment of the Court of Appeals.

3. The respondents seek a rehearing upon the following grounds:

A. This Court violated its rules of appellate review in violation of rights of due process accorded to respondents.

Respondents insist that this Court has overlooked and failed to apply its own decision in *National Indemnity Company v. Smith-Gandy, Inc.*, 50 Wn.2d 124, 309 P.2d 742 (1957):

> This court will not review a case on a theory different from that on which it was tried in the trial court, and questions not raised in that court will not be considered on appeal.

and *State v. McDonald*, 74 Wn.2d 474, 445 P.2d 345 (1968):

> A case cannot be tried on one theory and appealed on another.

The foregoing has been a maxim of law adhered to by this Court throughout the years.

B. The jury's absolving of respondents from tort liability should be conclusive against a finding against them on a new theory in strict liability.

> Where the action was tried below only on the theory of tort liability, recovery will not be allowed on appeal on any contract theory. 5 Am. Jur.2d Appeal and Error § 568.
>
> . . . The Court's finding of bad faith (which is conclusive) supports the judgment entered . . . we do not find it necessary to express an opinion on the issue as to whether under the circumstances appellant breached its contract . . . *Evans v. Continental Cas. Company*, 30 Wn.2d 614, 630, 245 P.2d 470 (1952) (Court's parenthesis).
>
> One suing for damages . . . (in negligence) . . . cannot, on appeal, change the theory of his cause of ac-

tion to one based on an implied warranty . . . *Land v. Boyles*, 192 N.C. 542, 135 S.E. 464 (1926).

C. The decision of this Court would deny respondents a hearing in their case, in violation of due process of law afforded by the State and Federal Constitutions:

> Where a State Court overrules a consistent line of procedural decisions with a retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive rights' *Brinkerhoff-Faris Trust & Sav. Co., v. Hill*, 281 U.S. 673, 74 L.ed. 1107 (*Bouie v. Columbia*, 378 U.S. 347, 354 (1964).
>
> A Federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment. *Bouie* at 281 U. S. 354.
>
> The Federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive or administrative branch of government . . . our present concern is solely whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. *Brinkerhoff, supra*, 281 U.S. at 680-1.

D. Under this court's decision, the absence of necessary third parties defendant would result in the deprivation of respondents' property without due process of law.

In its decision, this court seeks to place the burden of liability "upon the one of the two innocent parties whose acts instigated or made the harm possible". Respondents defended this case against a charge of their negligence. Had they been sued as innocent parties under strict liability, they would have joined additional "innocent parties": Peterbilt, the truck manufacturer; Pacific Car and

Foundry Company, its parent company; Fruehauf Company, the builder of the tank and trailer; Silver Eagle Company, the manufacturer of the fifth wheel; as well as the parties who maintained and loaded the truck in question. To restrict imposition of liability to only two of several innocent parties who may have been instrumental to the accident deprives the innocent parties-respondent of property without due process of law. (It is noted that the cause of action herein occurred on November 22, 1967. Remedies against other parties have now been lost due to lapse of time.)

E. This court violated its rules on appeal in reviewing facts concluded by the jury, in violation of respondents' right to a jury trial.

This Court concluded that carrying gasoline as freight is an "abnormally dangerous activity", a finding of fact which was not reviewed below. In its opinion, this court concludes that the negligence of the deceased was not a proximate cause of her loss, yet the jury reviewed the issue of her contributory negligence and found for the respondents. This court apparently found as fact that the trailer connection in the truck was not secure. This fact had been reviewed by the jury to the favor of respondents. This court accepts as fact that "there was no evidence of impact on the vehicle which she had driven . . . except that the left front headlight was broken". However, the jury considered the fact of damage to the left front fender and headlight assembly (St. 329 and 359, Ex. 14). The evidence nowhere discloses that any necessary evidence was destroyed in the accident, yet this court concludes "it is quite probable that the most important ingredients of proof will be lost in a gasoline explosion and fire.

F. Respondents insist that this court has failed to apply the decision of *Fletcher v. Rylands*, L.R. 1, Ex. 265, 278 (1866), affirmed, L.R. 3 H.L. 330, giving as the reason for its rule of strict liability:

> . . . the person whose mine is flooded by the water from his neighbor's reservoir . . . *is damnified without* any fault of his own. (Emphasis added.)

In its decision this Court disregarded the fact issue of decedent's fault, which was resolved by the jury to respondents' favor. This court must view this evidence in light most favorable to respondent. *Davis v. Early Construction Co.*, 63 Wn.2d, 252, 254, 386 P.2d 958 (1963); This court has also overlooked the following authority: *Foster v. Preston Mill Co.*, 44 Wn.2d 440, 446, 268 P.2d 645 (1945):

> The policy of the law does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual use of land.

Kind v. Seattle, 50 Wn.2d 485, 487, 312 P.2d 811 (1957):

> (Defendant) can excuse himself by showing that the escape (of a mischievous substance) was owing to plaintiff's default; or perhaps the escape was a consequence of *vis major*, or the act of God; . . . *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866).

The respondents herein have met their burden of explaining the accident and have proved their own freedom from negligence.

In *Pacific Northwest Bell v. Port of Seattle*, 80 Wn.2d 59 ..... P.2d ..... (1971). This court concluded, ". . . that underground water mains do not constitute an abnormal condition warranting strict liability . . . is supported by case authority . . . water mains are universally used in cities, and to hold that a proper and reasonable use of such mains

'necessarily involved a risk of serious harm to the person, land or chattels or others' would be contrary to the experience of at least several generations". The cases reviewed in *Pacific Northwest Bell* nevertheless confirmed that water mains do, in fact, create harm to persons or chattels. The instant case indicates that gasoline trucks likewise can cause harm to the person, yet this court has concluded that it is an "abnormally dangerous" risk, without basis in authority or impirical experience. Like water mains, gasoline trucks are now in universal use, yet the record does not disclose that they necessarily involve an abonormal risk of harm to others. As this court stated in its opinion, "had the activity been found abnormally dangerous, this court would have applied in (*Pacific Northwest Bell*) the rule of strict liability." There, the issue and theory of strict liability had been tried. Here, there was no trial or finding of fact of an "abnormally dangerous" activity in the truck transport of gasoline. The conclusion of this Court deprives respondents opportunity to submit evidence or obtain a verdict on the facts.

G. This court has transgressed an area of the legislature.

The power to impose liability for activities considered extra-hazardous is properly a subject for the legislature. See *Adler's Quality Baker, Inc., v. Gaseteria,* 32 NJ 55, 159 A.2d 97 (1960), and NJSA 6:2-7; R.R. 4:58-3, where the New Jersey Supreme Court approved of legislative action making the owners of aircraft absolutely liable for ground damage caused thereby. In that case the aircraft owner was given notice and opportunity to join additional parties defendant who would be liable for indemnity or for contribution as joint tort-feasors. Here, respondents and appellants were both represented by excellent counsel. Without

notice or opportunity to defend a charge of strict liability, respondents defended the negligence action, to their ultimate detriment. They are now barred by statutes of limitation from bringing in third parties who would have shared the risk of strict liability. RCW 4.16.080, 130.

H. Under this court's decision, respondent's adjudication of innocence cannot be maintained as *res judicata* in any possible future action for indemnity, the respondents not having tendered the defense to third parties. *Farmers Warehouse Company v. Frey,* 181 Wash. 365, 43 P.2d 23 (1935).

The imposition of strict liability upon these innocent respondents without trial on the issue nor opporunity to join third parties, nor ability to seek adequate indemnity, would be a deprivation of their property without due process of law, in violation of the Federal Constitution. *Brinkerhoff-Faris, supra,* 281 U.S. 673.

I. This court had overlooked and failed to apply its own decisions in the following cases in ruling against respondents on the issue of the *res ipsa loquitur* instruction:

Zukowsky v. Brown, 79 Wn.2d 586, 488 P.2d 269 (1971)

Siegler v. Kuhlman, 3 Wn.App. 231, 473 P.2d 445 (1970)

Clarke v. Icicle Irrigation District, 72 Wn.2d 201, 203, 432 P.2d 541 (1967)

Pederson v. Dumochel, 72 Wn.2d 73, 431 P.2d 973 (1967)

For the reasons and authorities herein presented, this court should rehear and reconsider its decision in this case.

Respectfully submitted,

JOHN C. KOUKLIS of
DAVIES, PEARSON, ANDERSON,
GADBOW & HAYES, P.S.

APPENDIX D

[FILED
Supreme Court
State of Washington
73 Jan. 4 pm 10:51
/s/ WILLIAM M. LOWRY
Clerk Deputy]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MRS. JACOB SIEGLER, Individually and as Administratrix, *Petitioner,* v. AARON L. KUHLMAN, *et al.*, *Respondents.*	No. 41696 Department..... ORDER Denying Petition for Rehearing

The Court having considered the respondents' petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 4th day of January, 1973.

By the Court: